83-918

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KAY ANN KROGUL,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

TIMOTHY P. O'NEILL *
The John Marshall Law School
315 S. Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

EDWIN J. BELZ
PAUL A. McWILLIAMS
234 N. Northwest Highway
Palatine, Illinois 60067
(312) 359-9191

Attorneys for Petitioner

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Is the double jeopardy clause violated when, following an acquittal on murder and a hung jury on voluntary manslaughter, the prosecution attempts to re-try defendant for voluntary manslaughter, since Illinois defines the latter crime as merely consisting of all the elements of murder plus certain mitigating circumstances?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Other Authorities

In The

Supreme Court of the United States

October Term, 1983

KAY ANN KROGUL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

Kay Ann Krogul petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois, Second District, in this case.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second District, is reported at 115 Ill. App. 3d 734, 450 N.E.2d 20 (1983). The order of the Supreme Court of Illinois denying leave to appeal on October 4, 1983 is as yet unreported.

JURISDICTION

The judgment of the Appellate Court of Illinois was entered on May 27, 1983 (App. A). The Supreme Court of Illinois denied leave to appeal on October 4, 1983 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .

The Illinois Criminal Code of 1961 provides in pertinent part:

> 9-1. MURDER
>
> (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
>
> (1) He intends either to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; . . .
>
> —Ill. Rev. Stat. ch. 38, par. 9-1(a) (1981)

9-2. VOLUNTARY MANSLAUGHTER

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

—Ill. Rev. Stat. ch. 38, par. 9-2(b) (1981)

STATEMENT OF THE CASE

On November 16, 1981, the Lake County, Illinois, grand jury returned a four count indictment against Petitioner Kay Ann Krogul. Three of the counts were for murder, with each count specifying a different state of mind (*see* Ill. Rev. Stat. ch. 38, pars. 9-1(a)(1) and 9-1(a)(2) (1981)). The fourth count was for voluntary manslaughter based on an unreasonable belief of self-defense (Ill. Rev. Stat. ch. 38, par. 9-2(b) (1981)). (C. 13) All four counts arose out of one alleged homicide.

Prior to trial, the State entered a *nolle prosequi* on the voluntary manslaughter count. (C. 28) At trial, however, both the prosecutor and defense requested that the jury be instructed on voluntary manslaughter based on unreasonable belief of self-defense (Ill. Rev. Stat. ch. 38, par. 9-2(b) (1981)), and the trial judge obliged. The jury was also instructed on justifiable use of force, *i.e.* self-defense. Ill. Rev. Stat. ch. 38, par. 7-1 (1981).

Following deliberations, the jury returned a verdict of "not guilty" for the offense of murder, and a judgment

of acquittal was entered on that charge. (C. 72) However, the jury was unable to reach a verdict on the voluntary manslaughter charge, and a mistrial was declared. (C. 74)

The State subsequently attempted to re-try Petitioner on the voluntary manslaughter charge. Petitioner filed a motion to dismiss claiming that a second trial was barred by the previous acquittal. The trial court denied the motion. (C. 86-91) Petitioner then appealed, pursuant to Illinois Supreme Court Rule 604(f). *See* 87 Ill. 2d R. 604(f), effective July 1, 1982.

The Appellate Court made no attempt to analyze the elements of the offenses of murder and voluntary manslaughter, but merely held that double jeopardy did not bar a re-trial on a charge in which a jury failed to reach a verdict. (App. A)

The Supreme Court of Illinois denied Petitioner's request for leave to appeal on October 4, 1983. (App. B)

REASONS FOR GRANTING THE WRIT

This case involves little more than a straight-forward application of the principles of *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 187 (1977) concerning "greater" and "lesser included" offenses for purposes of the double jeopardy clause. U.S. CONST. amend. V. What is unique, however, is that in this case the Illinois Criminal Code punishes the "lesser included offense" *more severely* than the "greater offense." This factual oddity has prevented Illinois courts from fully appreciating the double jeopardy interests at stake in this case.

Kay Ann Krogul was tried for murder. Ill. Rev. Stat. ch. 38, par. 9-1 (1981). At trial, both the State and defendant requested that the jury be instructed on voluntary manslaughter based upon the unreasonable use of deadly force. Ill. Rev. Stat. ch. 38, par. 9-2(b) (1981). The jury returned a "not guilty" verdict as to murder and a judgment of acquittal was entered on that charge. (C. 72) The jury was unable to reach a verdict on the voluntary manslaughter charge and a mistrial was declared. (C. 74) When the State attempted to again try Ms. Krogul for voluntary manslaughter, she objected on double jeopardy grounds. (C. 86-91) Both the trial court and the Appellate Court of Illinois denied relief. (App. A) The Illinois Supreme Court denied her petition for leave to appeal. (App. B)

The general principles of double jeopardy are not in dispute. The double jeopardy clause forbids a second prosecution for the same offense after acquittal. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The established test for determin-

ing whether two criminal counts are two offenses or only one is "whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). *Brown v. Ohio* compared "greater" and "lesser included offenses" thusly:

> As is invariably true of a greater and lesser included offense, the lesser offense . . . requires no proof beyond that which is required for conviction of the greater . . . . The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it. 432 U.S. at 168.

With these principles in mind, the Illinois murder and voluntary manslaughter statutes must be examined. It should first be noted that these Illinois offenses bear no relation to the identically named common law crimes. The Illinois Criminal Code of 1961 deleted all references to the common law concept of "malice aforethought." Illinois retained the common law names but jettisoned the common law substance.

The prosecution establishes murder in Illinois simply by showing that a defendant performed acts which caused the unjustified death of the victim and that the acts were performed with one of several specified mental states. Ill. Rev. Stat. ch. 38, par. 9-1(a) (1981). This is the instruction the jury received at the trial (emphasis added):

> **To sustain the charge of murder, the State must prove the following propositions:**
> ***First:*** **That the defendant performed the acts which caused the death of [the deceased]; and**
> ***Second:*** **That when the defendant did so,**
> **(1) She intended to kill or do great bodily harm to [the deceased];**
>
> **or**

(2) She knew that her act would cause death or great bodily harm to [the deceased];

or

(3) She knew that her acts created a strong probability of death or great bodily harm to [the deceased];

Third: **That the defendant was not justified in using the force which she used.**

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

Illinois Pattern Jury
Instructions—Criminal
7.02 and 24-25.06A
(2d ed. 1981)

The jury found defendant "not guilty" of this charge and a judgment of acquittal was entered. (C. 72)

The jury at defendant's trial could not agree on a verdict for voluntary manslaughter. This is the instruction the jury received; should there be a second trial, that jury would receive an identical instruction (emphasis added):

To sustain the charge of voluntary manslaughter, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of [the deceased]; and

Second: That when defendant did so,

(1) She intended to kill or do great bodily harm to [the deceased];

or

(2) She knew that her acts would cause death or great bodily harm to [the deceased];

or

(3) She knew that her acts created a strong probability of death or great bodily harm to [the deceased]; and

Third: That when the defendant did so she believed that circumstances existed which would have justified killing [the deceased]; and

Fourth: That the defendant's belief that such circumstances existed was unreasonable.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

Illinois Pattern Jury
Instructions—Criminal
No. 7.06 (2d ed. 1981)

Note that the entire offense of murder is subsumed by voluntary manslaughter. Of the three elements needed to prove murder, the first two elements are identical to the first two elements of voluntary manslaughter; the third element—lack of justification—is presumed by the third and fourth elements of voluntary manslaughter. Unlike common law, which defined manslaughter as "murder minus malice," the Illinois code defines its own version of voluntary manslaughter as "murder *plus* mitigating circumstances." Murder and voluntary manslaughter in Illinois are thus the "same offense" under the *Blockburger* test. A jury has already determined that the elements of murder were not proved beyond a reasonable doubt; since these same elements are all found within the offense

of voluntary manslaughter in Illinois, double jeopardy principles prohibit a second trial for voluntary manslaughter.[1]

Illinois courts have exhibited a great deal of confusion concerning the changes in homicide law brought about by the Criminal Code of 1961. *See* O'Neill, "With Malice Toward None": A Solution to an Illinois Homicide Quandary, 32 DePaul L.R. 107 (1982). Unlike the usual *Brown* situation, here the "greater offense"—*i.e.*, the offense comprised of all the elements of the "lesser included offense" in addition to other elements—is voluntary manslaughter, the offense punished less severely than murder.

This case involves no novel legal question, merely a unique factual twist. Yet granting this petition would help not only to clarify double jeopardy principles, but would also prevent an obvious injustice. Correction of this error after a second trial will come too late. *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977). Moreover Petitioner respectfully suggests that this case is well suited for a summary decision on the merits without the necessity of briefing and argument.

---

[1] It is undeniable that the jury's two actions—a "not guilty" verdict for murder and a "hung jury" on voluntary manslaughter—were logically inconsistent. Yet this is irrelevant for Double Jeopardy purposes. The relevant fact is that the trial judge entered a judgment of acquittal on the jury's "not guilty" verdict on the murder charge. (C. 72). *Fong Foo v. United States*, 369 U.S. 141, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962); *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978); *Sanabria v. United States*, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978); *United States v. Martin Linen Supply*, 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977).

CONCLUSION

For these reasons, Petitioner respectfully asks this Court to grant this petition and reverse the decision of the Appellate Court of Illinois, Second District.

Respectfully submitted,

TIMOTHY P. O'NEILL *
The John Marshall Law School
315 S. Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

EDWIN J. BELZ
PAUL A. McWILLIAMS
234 N. Northwest Highway
Palatine, Illinois 60067
(312) 359-9191

Attorneys for Petitioner

* Counsel of Record

APPENDIX A

No. 82-623 Filed May 27, 1983

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

KAY ANN KROGUL,

Defendant-Appellant.

Appeal from the Nineteenth Judicial Circuit,
Lake County, Illinois.

JUSTICE HOPF delivered the opinion of the court:

Defendant was indicted on three counts of murder (Ill. Rev. Stat. 1981, ch. 38, pars. 9-1(a)(1) and 9-1(a)(2)), and one count of voluntary manslaughter (Ill. Rev. Stat. 1981, ch. 38, par. 9-2(b)). The State entered a *nolle prosequi* on the voluntary manslaughter count before trial. At trial, both the defendant and the State tendered an instruction on voluntary manslaughter and the State's instruction was given to the jury which tried the case. Defendant also submitted an instruction on justifiable use of force or self-defense, which was also given to the jury. A not-guilty verdict was returned for the offense of murder, and a judgment of acquittal was entered on that charge. The jury was unable to reach a verdict on the voluntary manslaughter charge, and a mistrial was declared.

The State attempted to continue the voluntary manslaughter prosecution, whereupon defendant filed a motion to dismiss claiming that the prosecution was barred by the previous *nolle prosequi* and acquittal. The motion was denied, and defendant appeals pursuant to Supreme Court Rule 604(f). 87 Ill. 2d R. 604(f), effective July 1, 1982.

Defendant contends that her motion to dismiss was erroneously denied because after the *nolle prosequi* of the voluntary manslaughter count and her acquittal of murder, nothing was pending before the court. She further claims that a retrial of the voluntary manslaughter charge is barred by her former acquittal of the greater offense of murder. (See Ill. Rev. Stat. 1981, ch. 38, par. 3-4(b)(1).) For the reasons that follow, we believe defendant's contentions are without merit.

The crime of voluntary manslaughter is a lesser included offense of murder and an accused may be convicted of voluntary manslaughter under an indictment for murder if the evidence warrants such a finding. (*People v. Fausz* (1982), 107 Ill. App. 3d 558, 562, 437 N.E.2d 702; *People v. Ellis* (1982), 107 Ill. App. 3d 603, 611, 437 N.E.2d 409; *People v. Burks* (1981), 103 Ill. App. 3d 616, 619, 431 N.E.2d 1085.) Thus, it is clear that the indictment for murder was sufficient to apprise defendant of the charge of voluntary manslaughter. (*People v. Simmons* (1982), 93 Ill. 2d 94, 100-101, 442 N.E.2d 891.) The State's *nolle prosequi* of the voluntary manslaughter count is therefore of no legal significance, and that count need not be revived by the State in order for the court to retain jurisdiction over the defendant as to that charge. We also note that defendant herself raised the issue of justifiable use of force in the initial trial, submitted an instruction on this issue to the jury, and there was evidence to support this defense. Under these circumstances, an instruction on voluntary manslaughter was required, and a failure to do so would have constituted reversible error on appeal. (*People v. Manley* (1982), 104 Ill. App. 3d 478, 483-84, 432 N.E.2d 1103; *People v. Smith* (1981), 94 Ill. App. 3d 969, 972-73, 419 N.E.2d 404; *People v. Lockett* (1980), 82 Ill.

2d 546, 550, 413 N.E.2d 378.) The charge of voluntary manslaughter was therefore properly before the jury in the original trial of this cause.

It is also well established that where a trial court, absent an abuse of discretion, discharges a jury because of its failure to reach a verdict, the constitutional prohibition against double jeopardy does not bar a new trial on that charge. (*People v. Rehberger* (1979), 73 Ill. App. 3d 964, 969, 392 N.E.2d 395; *People v. Bean* (1976), 64 Ill. 2d 123, 128, 355 N.E.2d 17; *Illinois v. Somerville* (1973), 410 U.S. 458, 35 L. Ed. 2d 425, 93 S. Ct. 1066.) Defendant has not alleged an abuse of discretion in the trial court's discharge of the jury. Thus, it must be presumed no abuse of discretion occurred. It is therefore evident that the reprosecution of defendant on the voluntary manslaughter charge is not barred on double jeopardy grounds.

Finally, defendant claims the retrial is barred by the compulsory joinder provisions of sections 3-3(b) and 3-4(b)(1) of the Criminal Code of 1961. (Ill. Rev. Stat. 1981, ch. 38, pars. 3-3(b) and 3-4(b)(1).) Section 3-3(b) provides:

> "(b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act."

Section 3-4(b)(1) provides:

> "(b) A prosecution is barred if the defendant was formerly prosecuted for a different offense, or for the same offense based upon different facts, if such former prosecution:
>
> (1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for an offense of which the defendant could have been convicted on the former prosecution; or was for an offense with which the defendant should have

> been charged on the former prosecution, as provided for in Section 3-3 of this Code (unless the court ordered a separate trial of such charge); or was for an offense which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution, or the offense was not consummated when the former trial began; * * *."

Defendant claims that because she was formerly acquitted of the offense of murder arising out of the same occurrence as that which forms the basis of the voluntary manslaughter charge, that acquittal acts as a bar to her subsequent prosecution for voluntary manslaughter.

As previously stated, an indictment for murder allows a defendant to be convicted of the lesser included offense of voluntary manslaughter. (*People v. Fausz* (1982), 107 Ill. App. 3d 558, 562, 437 N.E.2d 702; *People v. Goolsby* (1979), 70 Ill. App. 3d 832, 836, 388 N.E.2d 894.) Thus, the voluntary manslaughter charge was not required to be formally joined under Ill. Rev. Stat. 1981, ch. 38, par. 3-3(b). Further, Ill. Rev. Stat. 1981, ch. 38, par. 3-4(b)(1), is inapplicable in circumstances such as exist here. That section has been held to bar prosecutions which could have been brought in the first trial of the cause, but were not (*People v. Goolsby; cf. People v. Harrison* (1946), 395 Ill. 463, 70 N.E.2d 596), or prosecutions of a lesser included offense where the defendant was previously charged with and acquitted of the greater offense and the trier of fact in the first trial was silent as to lesser included offenses. In the latter situation, acquittal of the lesser offenses is implied by the jury's silence. (See *People v. Chatman* (1981), 102 Ill. App. 3d 692, 698, 430 N.E.2d 257; *People v. Jenkins* (1976), 41 Ill. App. 3d 392, 393, 354 N.E.2d 139.) Neither of those situations exist in the present case. The voluntary manslaughter charge was implicitly joined with the murder charge in the original prosecution, and although the defendant was acquitted of murder, the jury was not silent as to the voluntary manslaughter offense.

The record reveals the jury was instructed on that charge and considered it, but was unable to return a unanimous verdict of either guilt or innocence. Under these circumstances, the jury was not silent on the voluntary manslaughter charge, and an acquittal of that charge need not be inferred from silence. *Accord, People v. Chatman; People v. Jenkins.*

A similar situation existed in *People v. Jenkins* (1976), 41 Ill. App. 3d 392, 354 N.E.2d 139. In that case, the defendant was indicted for attempted murder and the lesser included offense of aggravated battery. Following a jury trial, defendant was acquitted of attempted murder, but a mistrial was declared when the jury was unable to reach a verdict on the aggravated battery charges. The State attempted to reprosecute defendant for aggravated battery, and defendant filed a motion to dismiss claiming section 3-4(b)(1), Ill. Rev. Stat. 1973, ch. 38, par. 3-4(b)(1), barred a subsequent prosecution of the lesser included offense following acquittal on the greater offense. The trial court granted the motion, but the appellate court reversed, stating that section 3-4(b) was "never intended to be applied when the lesser included offense was charged in the indictment and a mistrial was declared because the jury failed to agree on a verdict." (41 Ill. App. 3d 392, 393, 354 N.E.2d 139.) Defendant here distinguishes *Jenkins* from the instant case on the ground that in *Jenkins* defendant was formally indicted on the lesser included offense, whereas here the formal indictment on the lesser offense was nol-prossed by the State. While this distinction does exist, it is in our opinion of little significance in light of established case law permitting a voluntary manslaughter conviction upon an indictment for murder. One of the principal purposes of an indictment is to put the defendant on notice of what he stands charged with so that he might adequately prepare his defense. Having once gone through a trial on these charges, the defendant certainly had such notice. (*People v. Brownell* (1980), 79 Ill. 2d 508, 524, 404 N.E.2d 181, *cert. dismissed* (1980), 449 U.S. 811, 66 L. Ed. 2d 14, 101

S. Ct. 59; *People v. Sims* (1982), 108 Ill. App. 3d 648, 651, 439 N.E.2d 518.) We therefore find the *Jenkins* case controlling here, despite the absence of a formal indictment for the lesser included offense of voluntary manslaughter.

Accordingly, the decision of the circuit court of Lake County denying defendant's motion to dismiss is affirmed.

AFFIRMED.

SEIDENFELD, P.J., REINHARD, J., concur.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 4, 1983

Mr. Edwin J. Belz
Attorney at Law
234 N. Northwest Highway
Palatine, IL 60067

No. 58604—People State of Illinois, respondent, vs. Kay Ann Krogul, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

P. S. The Mandate of this Court will issue to the Appellate Court on October 26, 1983.

No. 83-913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KAY ANN KROGUL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General, State of Illinois

MARK L. ROTERT *
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Counsel for Respondent

KENNETH A. FEDINETS
Assistant Attorney General
Of Counsel

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 32168—30—1-84)

QUESTION PRESENTED FOR REVIEW

Where the jury was unable to reach a verdict on the offense of voluntary manslaughter and thus trial court declared a mistrial, is prosecution of petitioner on voluntary manslaughter charge barred on the basis of double jeopardy?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In The

Supreme Court of the United States

October Term, 1983

KAY ANN KROGUL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Appellate Court, Second District, is reported at *People v. Krogul*, 115 Ill. App. 3d 734, 450 N.E.2d 20 (2d Dist. 1983). The opinion has been submitted to this Court as an Appendix to the Petition for Writ of Certiorari and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. §1254(3).

STATEMENT OF THE CASE

Petitioner was indicted by the Lake County, Illinois, Grand Jury on three counts of murder and one count of voluntary manslaughter. The State entered a *nolle prosequi* on the voluntary manslaughter count before trial. At the jury instruction conference, both the petitioner and the State tendered an instruction on voluntary manslaughter as a lesser included offense of murder. The jury was instructed on the offense of voluntary manslaughter and on the justifiable use of force or self-defense.

The jury returned a not guilty verdict for the offense of murder, and a judgment of acquittal was entered on that charge. However, the jury was unable to reach a verdict on the voluntary manslaughter charge, and a mistrial was declared.

The State then sought to continue the prosecution for voluntary manslaughter. Petitioner filed a motion to dismiss the prosecution and claimed that further prosecution was barred on the basis of double jeopardy. The trial court denied the motion, and petitioner appealed. The Illinois appellate court affirmed the trial court's denial of the motion. *People v. Krogul*, 115 Ill. App. 3d 734, 450 N.E.2d 20 (2d Dist. 1983).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court to deny the petition for writ of certiorari to review the decision of the Illinois Appellate Court, Second District, insofar as petitioner does not raise a question of constitutional proportion that is worthy of review. In seeking a writ of certiorari in this cause, petitioner advances a single reason in support of issuance of the writ: Double jeopardy is violated when, following an acquittal on murder and a hung jury on voluntary manslaughter, the prosecution seeks to retry petitioner for voluntary manslaughter (Petition at 5). Respondent maintains further review of this case is unnecessary because the decision below does not depart from established precedent, both from this Court and Illinois appellate courts. The court below fully considered and correctly decided the question now presented for review. Respondent further maintains that it would not be prudent for this Court to grant certiorari in that the issue herein centers around facts peculiar to the case at bar, and would have limited impact on future litigants. Petitioner admits as much when he stated: "This case involves no novel legal question, merely a unique factual twist." (Petition at 9)

WHERE THE JURY WAS UNABLE TO REACH A VERDICT ON THE OFFENSE OF VOLUNTARY MANSLAUGHTER AND THUS TRIAL COURT DECLARED A MISTRIAL, PROSECUTION OF PETITIONER ON VOLUNTARY MANSLAUGHTER CHARGE WAS NOT BARRED ON THE BASIS OF DOUBLE JEOPARDY.

Petitioner was indicted by the Lake County, Illinois, Grand Jury on three counts of murder and one count of voluntary manslaughter. The State entered a *nolle prosequi* on the voluntary manslaughter count before trial. At the jury instruction conference, both the petitioner and the State tendered an instruction on voluntary manslaughter as a lesser included offense of murder. The jury was instructed on the offense of voluntary manslaughter and on the justifiable use of force or self-defense.

The jury returned a not guilty verdict for the offense of murder, and a judgment of acquittal was entered on that charge. However, the jury was unable to reach a verdict on the voluntary manslaughter charge, and a mistrial was declared.

The State then sought to continue the prosecution for voluntary manslaughter. Petitioner filed a motion to dismiss the prosecution and claimed that a retrial on the voluntary manslaughter charge would constitute double jeopardy in light of his acquittal on the murder charge. The trial court denied the motion, and petitioner appealed. The Illinois appellate court affirmed the trial court's denial of the motion.

Petitioner, by way of this petition, claims that double jeopardy bars prosecution for the offense of voluntary manslaughter where a mistrial is declared as to that offense and petitioner has been acquitted of the offense of murder. This basis of petitioner's argument is that where he has been acquitted of the lesser included offense,

murder, retrial, is barred as to the greater offense of voluntary manslaughter. (Petition at 5). Respondent submits that petitioner's argument is without merit in that it is based upon misapplication of Illinois law.

It is well settled in Illinois that the offense of voluntary manslaughter is a lesser included offense of murder. *People v. Ellis*, 107 Ill. App. 3d 603, 437 N.E.2d 409 (2d Dist. 1982). Accordingly, one who is charged with the greater offense of murder may be convicted of the lesser included offense of voluntary manslaughter. *People v. Lewis*, 51 Ill. App. 3d 109, 366 N.E.2d 446 (1st Dist. 1977). Contrary to petitioner's argument, manslaughter is a lesser included offense of murder.

Although acquitting petitioner of the greater offense of murder, the jury was not silent as to the included offense of voluntary manslaughter. The jury did consider the charge, however, they were unable to reach a unanimous verdict as to guilt or innocence. Thus, a mistrial was declared as to the offense of voluntary manslaughter.

It is well established that a trial court may properly declare a mistrial and discharge a jury when it is apparent that the jury is unable to reach a verdict. *People v. Mays*, 23 Ill.2d 520, 179 N.E.2d 645 (1962). Where the trial court discharges the jury because of its failure to reach a verdict of either acquittal or conviction, the constitutional prohibition against double jeopardy does not bar a new trial. *United States v. Perez*, 22 U.S. (9 Wheat) 579 (1824).

Furthermore, the fact that the jury in petitioner's trial acquitted him of murder and hung on the voluntary manslaughter charge, thereby causing a mistrial as to the voluntary manslaughter charge and allowing the State to proceed on the unresolved charge, does not dictate a different result. The situation in the case at bar is analogous

to that where a defendant may be retried on a lesser offense, of which he was convicted at an initial trial, after that conviction was reversed on appeal; that result obtains even though the first trial resulted in a verdict of acquittal on a greater offense. *Prince v. Georgia*, 398 U.S. 323, 326-27 (1970). In *Prince* the defendant had been tried simultaneously on murder and manslaughter charges and had been convicted of the lesser offense. The defendant successfully appealed that conviction, and the judgment was reversed. In reversing a murder conviction obtained in a second trial on the ground that the acquittal on that charge in the first trial barred its reprosecution, this Court made clear that a retrial on the manslaughter charge was proper:

> The continuing jeopardy principle necessarily is applicable to this case. Petitioner sought and obtained the reversal of his initial conviction for voluntary manslaughter by taking an appeal. Accordingly, no aspect of the bar on double jeopardy prevented his retrial for that crime.

Id.

Petitioner stands in a position identical to the defendant in *Prince*. It is clear that the concept of continuing jeopardy normally applies to a mistrial caused by a deadlocked jury. *United States v. Sanford*, 429 U.S. 14 (1976). Furthermore, an acquittal on a greater offense does not preclude a retrial on a lesser offense to which continuing jeopardy has attached where a mistrial is caused by a deadlocked jury. *United States v. Larkin*, 605 F.2d 1360, 1369 (5th Cir. 1979), *cert. denied*, 446 U.S. 939 (1980).

In the instant case, there is no question that the jury was deadlocked and could not reach a verdict on the voluntary manslaughter charge. Consequently, the declaration of a mistrial as to the offense was proper, and the

State is not barred from placing petitioner on trial for the offense of voluntary manslaughter. "The interests of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction, need not be foresaken by the formulation or application of rigid rules" which petitioner seeks to have the Court adopt. *Illinois v. Somerville*, 410 U.S. 458, 463 (1973).

CONCLUSION

In view of the foregoing reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

MARK L. ROTERT *
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Counsel for Respondent

KENNETH A. FEDINETS
Assistant Attorney General
Of Counsel

* Counsel of Record

No. 83-913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KAY ANN KROGUL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

TIMOTHY P. O'NEILL *
The John Marshall Law School
315 S. Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

EDWIN J. BELZ
PAUL A. McWILLIAMS
234 N. Northwest Highway
Palatine, Illinois 60067
(312) 359-9191

Attorneys for Petitioner

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

In The

Supreme Court of the United States

October Term, 1983

KAY ANN KROGUL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The brief of the State of Illinois so shockingly fails to meet Petitioner's argument as to practically constitute a confession of error. Nevertheless, some remarks are necessary.

The State refuses to acknowledge that the Illinois versions of "murder" and "voluntary manslaughter" *bear no relation* to "common law murder" and "common law voluntary manslaughter." At common law, murder contained "malice aforethought"; voluntary manslaughter was basically "murder minus malice aforethought." The Illinois Criminal Code of 1961, however, totally departed from these common law definitions by abolishing the concept

of "malice aforethought." *See* Ill. Rev. Stat. ch. 38, par. 9-1 (1981) (Committee Comments). In Illinois, murder is the intentional or knowing killing of a human being without justification. Ill. Rev. Stat. ch. 38, par. 9-1 (1981) What Illinois refers to as "voluntary manslaughter" is composed of murder—*i.e.*, the intentional or knowing killing of a human being without justification—*plus* certain mitigating circumstances. Ill. Rev. Stat. ch. 38, par. 9-2 (1981). *See* O'Neill, *"With Malice Toward None": A Solution To An Illinois Homicide Quandary*, 32 DePaul L.R. 107 (1982); Haddad, *Allocation Of Burdens In Murder—Voluntary Manslaughter Cases: An Affirmative Defense Approach*, 59 Chicago Kent L.R. 23, 26-31 (1982). Illinois courts, although slow to grasp the distinction, are beginning to recognize this. *See People v. Minnis*, 118 Ill.App. 3d 345, 360-361, 455 N.E.2d 209, 220-221 (1983).

In the case at bar, the jury acquitted Petitioner on the Illinois version of murder and was "hung" on the Illinois version of voluntary manslaughter. Obviously, the State is precluded from retrying Petitioner for Illinois voluntary manslaughter. This is because at a second trial the State would first have to prove all the elements of Illinois murder; since Petitioner has already been acquitted of this charge, double jeopardy forbids a retrial. *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).[1]

---

[1] Petitioner re-emphasizes that the jury's verdicts in this case were logically inconsistent; in Illinois an acquittal on murder is *a fortiori* an acquittal on voluntary manslaughter. These contradictory verdicts were caused by the thoroughly inept Illinois Pattern Jury Instructions tendered in this and every murder/voluntary manslaughter case in Illinois. *See* O'Neill, *supra*, pp. 118-123. For double jeopardy purposes, the relevant fact is that the jury acquitted on murder and judgment was entered on that verdict. (C. 72)

Obviously, the result is *totally different* in a common law jurisdiction. There, an acquittal on common law murder and a hung jury on common law voluntary manslaughter in no way precludes a second trial for common law voluntary manslaughter. That is because the jury's acquittal on common law murder merely shows that the unjustified homicide was not accompanied by "malice aforethought." Surely such a verdict does not preclude a conviction for common law voluntary manslaughter, for which no showing of "malice aforethought" is necessary. A second trial for common law voluntary manslaughter would be entirely proper. *United States v. Gooday*, 710 F.2d 80 (9th Cir. 1983).

The case at bar, however, is no different from a situation in which a defendant is tried for armed robbery and robbery arising out of one alleged incident. Assume a jury acquits defendant of robbery and is "hung" on the armed robbery charge; a judgment of acquittal is entered on the robbery charge. Putting aside the logical inconsistency of the verdicts, it is clear that defendant cannot be retried for armed robbery; the acquittal for robbery precludes a conviction for armed robbery.

The case at bar is exactly the same. In Illinois, "voluntary manslaughter" is no more than murder *plus* mitigating circumstances. Therefore, Petitioner's acquittal on murder precludes a second trial for voluntary manslaughter.

Petitioner urges this Court to consider the serious double jeopardy problems involved in this case. Petitioner reiterates that this case is well suited for a summary decision on the merits without the necessity of briefing and oral argument.

CONCLUSION

For these reasons, Petitioner respectfully asks this Court to grant this petition and reverse the decision of the Appellate Court of Illinois, Second District.

Respectfully submitted,

TIMOTHY P. O'NEILL*
The John Marshall Law School
315 S. Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

EDWIN J. BELZ
PAUL A. McWILLIAMS
234 N. Northwest Highway
Palatine, Illinois 60067
(312) 359-9191

Attorneys for Petitioner

* Counsel of Record